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REMARKS ON THE SYMPOSIUM: THE MORALITY OF LAW

By FRANCIS H. PARKER†

THE PRIMARY question which has emerged from this symposium is this: Are the eight canons propounded by Professor Fuller in Chapter Two of his new book, *The Morality of Law*, "the internal morality of law" as he claims; or are they, on the contrary, merely *logical* conditions or criteria of law, of something's being a law or a system of laws, as claimed by Professors Cohen and Dworkin?

The question reminds me of the one which William James said he once heard being debated by a group of campers: Does a man who walks around a tree in order to see a treed squirrel, which keeps hidden by always facing the man from the opposite side of the tree, actually go around the *squirrel*?¹ Each of these two questions can be properly answered, as James said, only by following the Scholastic practice of making a distinction. One going round a treed squirrel circumnavigates the squirrel but never faces its back. The distinction which must be made in order to answer the question about the internal morality of law is, in simplest terms, the distinction between the *law* and the *lawyer*.

If the question of the morality of the eight canons concerns the *law*, then surely Professors Cohen and Dworkin are correct in maintaining that the eight canons should be regarded as putative *logical* conditions of law, suggested criteria for something's being a law or a system of laws at all, the *logic* (rather than the morality) of law or of the concept of law. Professor Fuller does not seem to deny this however. He denies only the Cohen-Dworkin thesis that the eight canons are *merely* the logic of law and not *also* the internal morality of law. Hence everyone seems agreed that in order to have law at all the eight canons, or something like them, must *logically* (not morally) be satisfied. Does anyone then have a moral obligation to obey the eight canons? The answer is clearly in the affirmative, if, but *only* if, that person has a moral obligation to have law at all (either as its maker or its applier), for the eight canons are putatively logically equivalent to law itself.

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1. JAMES, PRAGMATISM, A NEW NAME FOR SOME OLD WAYS OF THINKING; POPULAR LECTURES ON PHILOSOPHY (1908).

Now then, is there a moral obligation to have law at all? Yes, but only in social situations marked by a certain degree of complexity. I do not see that an isolated individual has any obligation or indeed any need to have laws at all — though his continued existence and well-being create a conditional need and obligation for at least those informal rules of conduct which are the precursors of laws. Neither do small and simply organized groups have any need for or any moral obligation to have laws. Thus the moral obligation to have law is not a categorical one; it is only a hypothetical imperative or obligation conditional upon the obligation to have or the need for an organized social life possessing a certain degree of size and complexity.

The conditional moral obligation to have law, and thus also the logical obligation or necessity to conform to the eight canons which purport to define law logically, is, however, a moral obligation, not of the law itself, but of the law *man* — of the man who makes, applies, or obeys the law. The “internal morality”, the moral obligation to conform to the eight canons, is thus the morality of the *lawyer*, not of the *law*. Indeed, morality in general and moral pronouncements in particular can directly characterize only *persons*; they can be applied to *things*, such as law, only indirectly, that is, to the extent that those things are regarded as works or acts of persons. Professor Fuller so applies them by viewing law as purposive activity. While the eight canons are thus logical conditions of the law, the compliance with them is the “internal” or logical morality of the person who makes or applies the law. Such a morality is a specific instance of the more general morality of being rational or logical. That there is a morality of being rational, that men do have a moral obligation to be rational or logical, is clearly confirmed by ordinary conviction and language² and it may perhaps also be confirmed metaphysically as Plato, Aristotle and Kant indicate. Furthermore, it follows from the conditional morality of having law by satisfying its eight logical conditions (or something like them) that there is also, as Professor Fuller points out, a conditional moral obligation to create and enhance the *conditions* of lawfulness and its logicity or reasonableness. The citizens’ conditional moral duty to obey the law (at least some laws) entails, as Fuller rightly says, a correlative moral duty on the part of legislators and law appliers not to undermine the citizens’ moral duty to obey the law. Again, however, this is a morality of *lawyers* rather than of *law*.

2. E.g., “Look before you leap.”

What is the relation of this moral obligation of men to satisfy the eight canons and thus to have laws ("the internal morality of law") to the "external" or "substantive" morality of the laws thus made and applied? It is that the former is a necessary but insufficient condition of the latter, as Professor Fuller states and as Professors Cohen and Dworkin seem to agree. Just as being logical is a necessary but insufficient condition of completing any determinate action which is good,³ so also satisfying the eight canons (or something like them) is a necessary but insufficient condition for legislating and applying any determinate law which is good. The moral obligation to satisfy the eight canons (or something like them) demonstrates that it is good to *have* laws (in a society of a certain magnitude and complexity), but whether these laws which it is conditionally good to have are themselves *good* laws must depend upon other considerations. It is with these other considerations that the traditional doctrine of natural law is primarily concerned.

3. For if it is illogical or inconsistent it will not be one, single, determinate action.